

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

No. CR-04-237-FVS

v.

ORDER

MAURILIO RIVERA-LARA,
Defendant.

THIS MATTER comes before the Court on Defendant's Motion For Time Reduction by an Inmate in Federal Custody Under 28 U.S.C. § 2255. Defendant, proceeding pro se, argues that he is entitled to a sentence reduction because his ineligibility for various Bureau of Prison ("BOP") programs violates his rights under the Equal Protection Clause, Due Process Clause, and Equal Rights Act of 1964. The Court DENIES the motion because the Defendant should have raised his Equal Protection challenge on direct review and has not established why he did not raise the matter earlier. Additionally, the Defendant's ineligibility for certain BOP programs has already been considered by this Court and the Sentencing Guidelines.

I. BACKGROUND

On February 3, 2005, the Defendant pled guilty to one count of illegally reentering the United States following deportation without permission, in violation of 8 U.S.C. § 1326. The Defendant was

1 informed by this Court that a guilty plea carried a potential
2 punishment of a maximum of 20 years imprisonment. The Court sentenced
3 the Defendant to 46 months imprisonment and three years of supervised
4 release, the low end of the applicable Guideline range. On direct
5 appeal, the Ninth Circuit affirmed the Defendant's sentence without
6 oral argument. The Defendant now collaterally attacks his sentence
7 and moves this Court for a sentence reduction pursuant to 28 U.S.C. §
8 2255.

9 **II. SECTION 2255 RELIEF**

10 Under 28 U.S.C. § 2255, a prisoner in federal custody may
11 challenge his federal sentence "before the court where the movant was
12 convicted" and move the court to vacate, set aside or correct his
13 sentence upon a showing that (1) the sentence imposed violated the
14 Constitution or laws of the United States; (2) the court was without
15 jurisdiction to impose the sentence; (3) the sentence exceeded the
16 statutory maximum established by law; or (4) the sentence is
17 "otherwise subject to collateral attack." 28 U.S.C. 2255; United
18 States v. Addonizio, 442 U.S. 178, 185, 99 S.Ct. 2235, 2240, 60 L.
19 Ed. 2d 805, 811 (1979) (citing U.S. v. Hayman, 342 U.S. 205, 216-17, 72
20 S. Ct. 263, 271; 96 L. Ed. 232, 240 (1952)).

21 Review under Section 2255 is generally unavailable if the
22 defendant previously raised the matter on direct appeal and there was
23 no intervening change in law. Davis v. United States, 417 U.S. 333,
24 342, 94 S. Ct. 2298, 2303, 41 L. Ed. 2d 109, 116-17 (1974).
25 Nevertheless, a movant may raise a constitutional matter that he
26 failed to raise on direct review if he establishes cause for the

1 waiver and *actual prejudice* arising from the alleged violation.
2 Bousely v. United States, 523 U.S. 614, 622, 118 S. Ct. 1604, 1611,
3 140 L. Ed. 2d 828, 839-40(1994); United States v. Frady, 456 U.S. 152,
4 167, 102 S. Ct. 1584, 1594, 71 L. Ed. 2d 816, 830(1982).

5 In this case, *prior* to sentencing, the Defendant raised and this
6 Court considered the fact that his alien status made him ineligible
7 for certain community corrections programs under BOP policy. (Sent.
8 Memo. at 15.) The Defendant was put on notice at his plea hearing
9 that he faced up to 20 years imprisonment for his plea of guilty to
10 the crime of illegally re-entering the United States in violation of 8
11 U.S.C. 1326. (Appeal Tr. at 5.) Finally, on direct appeal, the Ninth
12 Circuit affirmed the Defendant's sentence because it was "reasonable."
13 (Slip Opinion at 3.)

14 The Defendant has failed to show why he did not raise his
15 ineligibility from certain BOP programs in his direct appeal.
16 Furthermore, the Defendant has not established that he will suffer any
17 actual prejudice if the court denies his Section 2255 motion,
18 especially in light of the fact that this Court had been apprised of
19 his ineligibility for BOP programs prior to his sentencing.
20

21 **III. DEPORTABLE ALIEN STATUS AND SENTENCE REDUCTION**

22 As a general matter, while a defendant's alien status must be
23 taken into account by the sentencing court, United States v. Charry
24 Cubillos, 91 F.3d 1342(9th Cir. 1996), a defendant's ineligibility for
25 certain programs is considered *only* if the sentence imposed would
26 otherwise conflict with the policy and goals of the Sentencing

1 Guidelines. United States v. Martinez-Ramos, 184 F.3d 1055, 1058 (9th
2 Cir. 1999). Notably, the Ninth Circuit has explained that the
3 "Sentencing Commission must have factored in deportable alien status
4 into [the sentencing range] for a Section 1326 offense, for the
5 defendant's status as a deportable alien found in the United States
6 without permission is the *very thing* being punished." Id. At 1058.

7 In this case, Section 2255 relief would only be proper if the
8 Defendant could show that his sentence and alien status ineligibility
9 for certain BOP programs otherwise conflicted with Sentencing
10 Guidelines policy. Charry-Cubillos, 91 F.3d at 1345. The Defendant
11 has failed to make such a showing. His deportable alien status was
12 already factored into the Guideline range imposed by this Court for
13 offenses committed in violation of 8 U.S.C. 1326. Therefore, the
14 Defendant's sentence is proper and did not "conflict" with the
15 Sentencing Guidelines.

16 The Court being fully advised,

17 **IT IS HEREBY ORDERED** that Mr. Rivera-Lara's § 2255 Motion, **Ct.**
18 **Rec. 52** is **DENIED** and the District Court Executive is directed to
19 close civil case number **CV-06-141-FVS**.
20

21 **IT IS SO ORDERED.** The District Court Executive is hereby
22 directed to enter this order and furnish copies to the **DEFENDANT**.

23 **DATED** this 21st day of March, 2008.
24

25 s/Fred Van Sickle
26 Fred Van Sickle
United States District Judge